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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

Petitioner,

v.

MELVIN VARNISH,

Respondent.

PETITION FOR REHEARING ON DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Justices of the Supreme Court of the United States:

With counsel stipulating that the case was governed by the law of Pennsylvania, trial before a jury resulted in an award to the respondent of $5,000.00 compensatory and $15,000.00 punitive damages. Motions for a directed verdict and for judgment n.o.v. were denied by the Trial Court. The judgment of the Trial Court was thereafter affirmed by the Court of Appeals, Judge Hays dissenting. On April 21, 1969, this Supreme Court denied the petition for certiorari herein, with Mr. Justice Black being of the opinion that the petition should be granted.

This petition for rehearing is now respectfully submitted, pursuant to Rule 58, subd. 2, of this Court, on the ground that the issue of the propriety of the award of punitive

damages is a substantial one which was not previously presented to this Court upon the original petition for certiorari.

The Court of Appeals below accepted the respondent's contentions "that the article was false and that it was published with knowledge that it was false or in reckless disregard for the truth. . . ." (App. A 5). The petitioner submits to this Court that while such finding would permit a jury to award compensatory damages for invasion of privacy, there was a total failure of proof, under the standards generally required, of any evidence of outrageous conduct which would warrant an award of $15,000.00 punitive damages.

The Restatement of Torts has been cited with approval *and followed by the Pennsylvania Supreme Court* as the standard to which an award of punitive damages is referable. *McSparran* v. *Pennsylvania Railroad Company*, 258 F.Supp. 130 (U.S.D.C., Ed. Pa., 1966); *Scott* v. *Curtis*, 200 Pa.Super. 44, 48, 186 A.2d 403 (1962). Section 908(1) of the Restatement of Torts states:

"§ 908. PUNITIVE DAMAGES.

> (1) 'Punitive damages' are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct."

Comment b. contains this language:

> "Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others."

In *Chambers* v. *Montgomery*, 411 Pa. 339, 192 A.2d 355 (1963), "outrageous conduct" was defined to be that which

is "done with a reckless indifference to the interests of others." (at p. 344). In essence, outrageous conduct is one which follows from a desire to wilfully and intentionally inflict harm on another and connotes an attitude or disposition of mind that is essentially perverse. It manifests a vindictive disregard of another's rights. *Richette* v. *Solomon*, 410 Pa. 6 (1963), 187 A.2d 910.

The vice that a divided Court below found in the offending article was that it was "ironic". If irony is compensable, is it also to be the basis for punitive damages despite the fact that the author of the article testified, without being controverted, that he had "tried to write a nice story . . ." and "to take the sting out of" the tragedy of the suicide of Mrs. Varnish and the slaying of her three children? (R. 130-1).

The gravamen of respondent Varnish's position is that the publisher should have told the world "the whole truth" by reprinting the entire suicide note which would have revealed how thoroughly miserable a husband he really was. As Judge Hays observed in his dissent below:

> "If the omitted part of the suicide message had been included, the story would have been more accurate but it would not have reflected plaintiff in any better light." (App. A 8).

It is significant that the article contained not one unkind word about Varnish nor about the deceased. There is no word about which even the deceased would have complained in her lifetime. The plaintiff's complaint is grounded on the circumstance that the publisher was sensitive enough (but if the Court below is correct, not *sensible* enough) to have refrained from describing Varnish as "impossible" and as having given his wife "a miserable life".

Even the most that Mr. Varnish could urge against the public article was that it:

> "*implies* that I don't know my wife, that I don't care that I don't love my children. This summarizes this whole thing up" (Tr. 68; emphasis added).

This was an implication, apparently, that Varnish drew, but a fair reading of the article contains not a word that makes any such implication whatsoever. That he chose to infer otherwise and to find irony in an article whose writer deliberately sought to write as a "nice story" (footnote, App. A 5) is an exercise in paradox: the considerate reluctance of the publisher to "invade the privacy" of Varnish's personal life by disclosing the uncomplimentary references to him in his wife's suicide note is to be deemed an invasion of his privacy.

To permit an award of exemplary damages to stand in this case, based upon the trial record, would be truly Orwellian for it means nothing else but that a publisher who commendably refused to dredge up the seamy aspects of a complainant's life is to be deemed to have perpetrated "outrageous conduct" and, therefore, properly punishable by paying punitive damages. Not only would the Court be withdrawing constitutional protection from the publisher's description of the deceased wife as "the happiest," but it would be withdrawing constitutional protection from the right of the publisher not to publish material concerning Varnish that could only have reflected Varnish, more than before, in an uncomplimentary light.

The majority of the Court of Appeals below agreed with Varnish that the published article

> ". . . cast him in a false and unfavorable light, that the 'happy wife and mother' theme used throughout

> the article was fictitious and was intended to be ironic, to indicate plaintiff's insensitivity and lack of caring and understanding for his wife." (App. A 5).

The Court of Appeals then concluded that the record showed that Mrs. Varnish "was in reality a despondent, depressed and extremely unhappy woman" (App. A 5). The suicide note might indicate that she was so, but such notes generally reveal only the disturbed condition of mind of the suicide at the time of the event. The contents of that note are not to be considered as the objective, calm and dispassionate description of her marriage with Mr. Varnish. The majority of the Court of Appeals conceded that there was documentary evidence of neighbors having advised the police that the Varnishes "seemed to get along fairly well." (App. A 6). However, the Court of Appeals completely ignored the fact that Varnish himself testified on cross-examination that, by and large, things ran smoothly in his household and there were certain times when his wife was "bright and cheerful." (Tr. 50-52); that a newspaper article quoted him as having said "I can't explain it; we had no difficulties." (Defendant's Exhibit B) and another newspaper article stated that he knew of no reason for the tragedy (Plaintiff's Exhibit 6). In addition, Varnish himself testified on trial:

> "I don't know to this day why my wife would kill herself" (Tr. 70).

Concededly, the article erred in describing Mrs. Varnish as the "happiest wife" but there was substantial evidence, as indicated above, to show that Mrs. Varnish was not an unhappy person, prior to the time she took her life and the lives of her three children. Upon this inaccurate and

allegedly ironic use of the suffix "iest" has been reared in the case at bar a conclusion of outrageousness and insensitivity that has permitted an award of punitive damages. This result is wholly at variance with the standards which the Pennsylvania courts have prescribed for the imposition of punitive damages and constitutes a grave threat to freedom of the press. In *Time, Inc.* v. *Hill,* 385 U.S. 374, Mr. Justice Brennan observed:

> "We create a grave risk of serious impairment of the indispensable service of free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated with a person's name . . . particularly as related to nondefamatory matter." (p. 389).

Given the circumstances in the case at bar, it is respectfully submitted that they could not and should not warrant the punishment of the publisher by burdening it with punitive damages. *Szekely* v. *Eagle Lion Films, Inc.,* 140 F.Supp. 843, 850-1 (U.S.D.C., S.D.N.Y., 1956), aff'd 242, F.2d 266, cert. den. 77 S. Ct. 1382, 354 U.S. 922, 1 L.Ed. 2, 1437.

This Court has recognized that an award of exemplary damages depends wholly upon the motive, the purpose and the condition of mind and heart of the wrongdoer and the circumstances and manner of doing wrong. *Bucher* v. *Krause,* 200 F.2d 576, cert. den. 73 S. Ct 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing den. 74 S.Ct., 17 346 U.S. 842, 98 L.Ed. 363.

The Restatement of Torts, Section 908, comment (d), uses the following language:

> "It is error for the trier of fact to award punitive damages where there has been no bad motive or wanton indifference; . . ."

It would be appropriate to inquire whether a free press can flourish if publishers of magazine articles and newspaper articles must be attuned to ironic implications in their articles, even where those articles are devoid of personal attack, degradation, depreciation and unkindness, and that if they should fail to recognize such irony then they shall have to answer in treble damages. To permit the award for exemplary damages to stand in this case is to fly in the face of literally hundreds and thousands of articles published daily and weekly which are replete with ironic implications. There has never been a standard raised for the press in this country that irony constitutes a compensable abuse of the exercise of the right of publication and that, even more, it is punishable by having exemplary damages awarded.

To insist that a publisher publishes at his peril unless, in describing a newsworthy event, such as the suicide and triple infanticide in the case at bar, he reveals all of the contents of a suicide not,—even those that are uncomplimentary to a surviving parent,—is to withdraw from publishers the constitutional protection of their rightful exercise of self-restraint, editorial judgment and literary freedom. *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Admittedly, the publishing standards generally of the petitioner in the case at bar are not on a parity with those of the *New York Times.* But these standards are not the subject of controversy here, but rather whether the published article itself fell so far below the standards of propriety and fair conduct as to entitle the respondent to an award of punitive damages. The issue here is a grave one

with, it is respectfully submitted, monumental significance for the press of this country. If this petitioner is to be punished for *not* revealing the full uncomplimentary text of a suicide note, publishers must concern themselves with the fear of being punished for much lesser offenses than what a divided Court of Appeals held to be offensive below.

Petitioner, therefore, prays that this Court grant rehearing herein and that, upon such rehearing, the petition for the writ of certiorari should be granted with respect to the reversal of the judgment of $15,000.00 punitive damages.

Respectfully submitted,

IRWIN M. TAYLOR
Attorney for Petitioner

CERTIFICATE OF ATTORNEY

I, Irwin M. Taylor, certify that I am the attorney for the petitioner herein, Best Medium Publishing Co. Inc.; that this petition for rehearing is presented in good faith and not for delay; and the petition is restricted to the above circumstances of substantial effect.

/s/ Irwin M. Taylor
Irwin M. Taylor